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IN THE

Supreme Court of the United States

October Term, 1955

No. 312

THE UNITED STATES, *Petitioner*

v.

THE OHIO POWER COMPANY

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The petition for a writ of certiorari filed by the United States in the above-entitled case should be denied.

The issue is no longer a live one because the statute expired in 1945; there is no conflict of decisions, and the decision below is correct, fully effectuating the intention of Congress affirmatively expressed in the legislative history of Section 124 of the Internal Revenue Code of 1939.

In an Appendix attached are set forth lower court opinions in related cases which were omitted from petitioner's Appendix.[1]

JURISDICTION

On March 1, 1955, the Court of Claims entered its opinion and granted respondent's Motion for Summary Judgment, at the same time denying a similar motion of petitioner. The money judgment was suspended to await the filing of a stipulation by the parties showing the amount due. On March 25, 1955, the stipulation was filed and the court entered the amount of the money judgment on March 30, 1955. In an application dated June 17, 1955,[2] petitioner requested an extension of time to August 12, 1955, for filing a petition for a writ of certiorari. The application was

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[1] Petitioner fails even to mention that the Tax Court has adopted the view of the Court of Claims in *National Lead Co.*, 23 T.C., No. 123, decided March 14, 1955, involving precisely the same issue. See Appendix, p. 19.

[2] Respondent respectfully directs the attention of this Court to the fact that on June 17, 1955, more than 90 days had elapsed following the lower court's final determination that respondent was entitled to recover and the granting of respondent's Motion for Summary Judgment. 28 U.S.C. § 2101(c). Rule 38(c) of the Rules of the Court of Claims provides that ". . . where the Court determines that a party is entitled to recover and the amount of the recovery is reserved for further proceedings, the judgment on the question of the right to recover shall be final. . ." In *United States* v. *Caltex (Philippines) Inc.*, 344 U.S. 149, this Court granted a timely petition for a writ of certiorari to review the decision of the Court of Claims in 100 F. Supp. 970, where that court had determined that the plaintiffs were entitled to recover but had reserved for further proceedings the amount of recovery. See Stern, Supreme Court Practice (2d Ed. 1954), p. 42; *F.T.C.* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 211-212.

granted by the Chief Justice on June 18, 1955. Respondent, on August 18, 1955, requested and was granted an extension of time to September 27, 1955, for the filing of its brief in opposition. Petitioner invokes this Court's jurisdiction under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Where the War Production Board certified taxpayer's entire emergency facility as necessary in the interest of national defense, did the Board have authority also to limit the amount of cost amortizable under Section 124 of the Internal Revenue Code of 1939 to only a part of the total cost of the certified emergency facility?

STATEMENT

During World War II the demand for electrical energy in the industrial areas of Ohio served by the taxpayer was unprecedented. Taxpayer's then existing facilities were inadequate to supply the needs of customers engaged in war production. Therefore, beginning in 1942 taxpayer undertook to expand. (R. 2-3.) Pursuant to the provisions of Section 124, taxpayer applied for and received four certificates of necessity from the War Department in 1942, 1943, and 1944. All these certificates certified that the entire construction of electric power facilities proposed in the applications was necessary in the interest of national defense during the emergency period, thereby entitling the taxpayer to amortize the total cost of those facilities over the 60-month period prescribed in the statute. (R. 19-20.)

On November 16, 1943, after two of above-mentioned certificates had been issued and while applications for the other two were still pending, taxpayer filed an

application for a fifth certificate. This application covered the construction of a 100,000 kilowatt steam generating plant and related equipment near Canton, Ohio, known as the "Tidd Project Emergency Facility." (R. 3, 20.)

In the meantime, the certifying function under Section 124 was transferred from the Secretaries of War and Navy to the War Production Board.[3] In January and July 1944, the Secretary of War issued the third and fourth certificates mentioned above certifying the electric power facilities listed therein as necessary to national defense and without any limitation upon the amount of amortizable cost.[4] (R. 20.) But in November 1944 the War Production Board issued to this

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[3] Executive Order 9406, 8 Fed. Reg. 16955, Dec. 17, 1943.

[4] For almost four years, from 1940, the Secretaries of War and Navy administered the certifying power entrusted to them by the statute. They consistently exercised only the single power to certify the construction or acquisition of facilities as necessary to national defense and did not attempt to specify that only some percentage of total cost would be entitled to the rapid amortization privilege. Petitioner states in footnote 6 of its Petition (p. 8) that the Senate Special Committee Investigating the National Defense Program "scored the War and Navy Departments for their failure" to use the percentage limitation. Examination of the cited S. Rep. No. 440, Pt. 2, 80th Cong., 2d Sess., p. 11, discloses only the statement that the W.P.B. official responsible for issuing certificates had testified he believed the cost of the war could have been reduced if the War and Navy Departments had used the percentage method adopted by W.P.B.

Any contention arising out of such testimony is of course directed to the wisdom of Congress in granting the right to amortize full cost and has no bearing on whether Congress did or did not grant the certifying agent the power to allow amortization of something less than the full cost of certified facilities. Obviously, the wisdom of legislation is not the concern of this Court.

taxpayer the fifth certificate, which had been applied for a year earlier, relating to the Tidd Project on which construction had commenced late in 1943. This certificate, which is in issue here, certified that the Tidd Project in its entirety was necessary in the interest of national defense, but attempted to limit the taxpayer's amortization right under Section 124 to 35 percent of the total cost of the project. (R. 4, 9, 21.)

This certificate was issued pursuant to an unpublished policy adopted by the Board attempting to limit the amortization deduction on necessary emergency facilities, as petitioner states, to the excess of wartime cost over normal pre-war cost (estimated to be 35 percent) where the facilities would presumably be useful in post-war operations (Petition for Certiorari, p. 3; R. 5-7).

When the five certificates were presented by this taxpayer to the Commissioner of Internal Revenue, he allowed amortization of the entire cost of the electric power facilities certified in the first four, but with respect to the Tidd Project certificate allowed amortization of only 35 percent of the construction cost despite the fact that the entire construction had been certified as necessary in the interest of national defense. At the time taxpayer received this certificate construction of the Tidd Project had been under way more than a year,[5] having been undertaken about the time it received other certificates from the War Department containing no limitation on the amount

[5] In order to expedite construction of national defense facilities Congress had written into the amortization law a provision specifically designed to encourage taxpayers to commence construction before receiving their certificates. Section 124(f)(3) of the Internal Revenue Code of 1939.

of construction cost amortizable. (R. 5-7, 8, 9, 20-22.) The percentage-of-cost policy which the Board applied was never promulgated in any regulation, nor was it otherwise published until after 1945.

The fundamental issue is whether Section 124(f)(1) of the Internal Revenue Code of 1939 conferred upon the War Production Board (successor to the Secretaries of War and Navy)

(1) the single power to certify that the construction or acquisition of facilities was "necessary in the interest of national defense," or

(2) the dual power to certify (a) the necessity of the construction or acquisition of the facility, and (b) the percentage of its cost which could be amortized for tax purposes during the "emergency period" of World War II.

There is absolutely no authority in Section 124(f)(1) empowering the Board to limit the amortizable base to some percentage of cost, and the legislative history conclusively establishes that Congress intended the statute to allow the certified facilities to be "completely written off for tax purposes" over a five-year period.[6]

Section 124 was enacted as a part of the Second Revenue Act of 1940, to be effective during the "emergency period" which was terminable by Presidential proclamation. The period was terminated by proclamation on September 30, 1945. (R. 20-22.)

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[6] Hearings before Senate Committee on Finance on Second Revenue Act of 1940, 76th Cong., 3d Sess. (1940), pp. 124, 125, 127; Cong. Rec., Aug. 29, 1940, pp. 11239, 11240, 11246. See also citations in footnotes 7 and 8, *infra*.

The statute was enacted for the express purpose of inducing private industry to invest its capital in projects necessary to national defense.[7] The inducement offered by the Administration and by Congress was that, in lieu of depreciation during normal useful life, the entire cost of projects certified as necessary in the interest of national defense would be deductible for income and excess profits tax purposes over a maximum period of sixty months, or over the "emergency period," if shorter. Thereby, private industry was assured that, to the extent its earnings in the emergency period equalled the cost of the national defense facilities, those earnings would be relieved from such taxes.[8]

The certifying agents (first the Secretaries of War and Navy, later the War Production Board) were authorized by Section 124(f)(1) to certify that the construction or acquisition of facilities was "necessary in the interest of national defense during the emergency period." When a certificate of necessity was issued the construction or acquisition became an "emergency facility." (Section 124(e).) Section 124 (a) provided that taxpayers might elect to deduct the

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[7] H.R., Rept. 2894, 76th Cong., 3d Sess., p 2; Joint Hearings before Committee on Ways and Means and Committee on Finance, Aug. 9, 10, 12-14, 1940, 76th Cong., 3d Sess., pp. 21-30; Statement of John D. Biggers, Tax Adviser to Council of National Defense at Hearings before Senate Committee on Finance on Second Revenue Act of 1940, 76th Cong., 3d Sess. (1940), pp. 166-167; Statement of William S. Knudsen, idem., p. 158.

[8] Joint Hearings before Committee on Ways and Means and Committee on Finance, August 9, 10, 12-14, 1940, 76th Cong., 3d Sess., pp. 74-75; Hearings before Senate Committee on Finance on Second Revenue Act of 1940, 76th Cong., 3d Sess., p. 123.

"adjusted basis" (i.e. cost) of any emergency facility over a period of sixty months, or over the emergency period if shorter.

Since the Commissioner failed to follow the mandate of Section 124(a) and allowed amortization of only 35 percent of the cost of constructing the Tidd Project, the taxpayer brought suit in the court below for refund of income and excess profits taxes paid in 1943, 1944 and 1945 with respect to the remaining 65 percent.

REASONS FOR DENYING THE WRIT

1. THE ISSUE IS NO LONGER A LIVE ONE

The certifying provisions of Section 124, under which this case arises, expired with the end of the emergency in 1945. In 1950 Congress enacted a new rapid amortization provision in connection with the Korean War excess profits tax law (Section 216 of Revenue Act of 1950; Section 124A Internal Revenue Code of 1939). In the new statute, Congress added a new clause, for the first time granting the certifying agent the power to certify a percentage of cost as well as the necessity of facilities.

A comparison of the two laws follows:

Section 124(f)(1)—1940-1945 Law	Section 124A(e)(1)—1950 Law
"[Sec. 124(f)]	"[Sec. 124A(e)]
"(f) DETERMINATION OF ADJUSTED BASIS OF EMERGENCY FACILITY.—In determining, for the purposes of subsection (a) or subsection (h), the adjusted basis of an emergency facility—	"(e) DETERMINATION OF ADJUSTED BASIS OF EMERGENCY FACILITY.—In determining, for the purposes of subsection (a) or subsection (g), the adjusted basis of an emergency facility—
"(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period. . ."	"(1) There shall be included only so much of the amount of the adjusted basis of such facility (computed without regard to this section) as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1949, as the certifying authority, designated by the President by executive order, has certified as necessary in the interest of national defense during the emergency period, *and only such portion of such amount as such authority has certified as attributable to defense purposes.* . ." (Italics supplied)

Thus, in the new law the Congress for the first time conferred upon the certifying agency the power to certify both (1) the necessity of the facilities, and (2) the amount of amortizable cost.

In the absence of the italicized clause in the second column, it is plain that the certifying agency had authority to certify only that the construction of facilities was necessary to national defense and had no power to specify that less than entire cost of construction of the certified facilities could be amortized.

Inasmuch as the old law has long since expired and the current law eliminates the question, the issue which petitioner seeks to have this Court review is dead. There is no reason for this Court to issue a writ in a case of this character where its decision will not aid the administration of current statutes. *Sokol Bros. Co.* v. *Commissioner,* 340 U.S. 932; *Community Services, Inc.* v. *United States,* 342 U.S. 932; *United States* v. *Abrams,* 344 U.S. 855; Stern, Denial of Certiorari Despite a Conflict, 66 Harv. L. Rev. 465, 466-468.

2. THERE IS NO CONFLICT OF DECISIONS

Three cases have been decided by the lower courts on the precise issue of the amount of the amortization deduction to which a taxpayer is entitled where the certificates of necessity have purported to limit the amortization right to a percentage of cost. All are in agreement that full cost is amortizable. Two of these decisions have been rendered by the Court of Claims—the case of *Wickes Corp.* v. *United States,* 108 F. Supp. 616, and the case at bar. The third decision is that of the Tax Court in the *National Lead* case, *supra,* to which petitioner does not refer. That opinion was reviewed by the 16 judges of the Tax Court and approved with only one dissent. The opinion adopts the view of the Court of Claims in the *Wickes* case and allows the taxpayer to amortize the full cost of the certified facilities over the accelerated period. (Appendix, p. 19.)

A different issue was involved in the case of *United States Graphite Co.* v. *Sawyer,* 176 F. 2d 868 (CA-D.C.), cert. den. 339 U.S. 904, affirming, *per curiam* without opinion but with one dissent, *United States Graphite Co.* v. *Harriman,* 71 F. Supp. 944 (D. Ct.

D.C.), relied upon by petitioner to establish a conflict. (Appendix, p. 8.) There the taxpayer sought a writ of mandamus directing the War Production Board to eliminate the 35 percent of cost limitation from the same Certificate of Necessity ultimately at issue in the *Wickes* case. The writ was denied. The District Court interpreted Section 124(f)(1) as granting authority to the War Production Board to certify both the necessity of the facilities and the percentage of cost entitled to amortization. On appeal, two judges adopted *per curiam* the District Court's opinion, but Judge Wilbur K. Miller, in a well-considered dissenting opinion, demonstrated that the majority had misconstrued the statute and had failed to give effect to the intention of Congress. (Appendix, pp. 8-18.) Both the Court of Claims and the Tax Court, in the later decisions, took care to state that they had reached the same conclusion as Judge Miller and agreed with his interpretation of Section 124(f)(1).

Even though the statutory interpretations conflict, it does not follow that the *Graphite* decision presents any direct conflict with the other three cases. It is hornbook law that the extraordinary writ of mandamus will not be issued to a governmental agency where the litigant has an adequate remedy at law. The later decision of the Court of Claims in the tax refund petition of the Wickes Corporation, successor to the U. S. Graphite Company, demonstrates that there was no legal basis for the issuance of a writ of mandamus.

Thus, it does not follow (as contended at p. 6 of the Petition) that the decisions are "irreconcilable" and that if the court in the *Graphite* case had interpreted the statute in the same way as the Court of Claims and the Tax Court, a writ of mandamus would have issued.

Quite the contrary, the court might well have held that the Graphite Company had not shown any injury from the Board's action and, if ultimately so injured, had an adequate legal remedy.

Petitioner can hardly be serious in its contention that the *Ohio* and *Wickes* decisions conflict with the *Graphite* case. If there is such a conflict, the Government most certainly would have applied for a writ of certiorari in the *Wickes* case two years ago, since the Solicitor General is virtually bound to bring conflicts in decisions of co-ordinate courts to the attention of this Court. Moreover, the Government would have asserted the defense of *res judicata* in the *Wickes* case, which it did not do.

3. THE AMOUNT INVOLVED IN THE ISSUE AT BAR IS MUCH LESS THAN STATED IN THE PETITION

The full cost of this taxpayer's facilities is deductible for income and excess profits tax purposes either through amortization in the World War II emergency period, or in later years through depreciation, obsolescence or other form of exhaustion. The revenue is affected only to the extent of differences in the tax rates. The maximum corporate tax rate in 1944 and 1945 was 80 percent of corporation surtax net income; the current corporate rate is 52 percent and in the intervening years the combined income and excess profits maximum tax rate has ranged from 38-70 percent.

On the basis of present corporate rates, the net tax reduction of the respondent here will be not more than approximately $2,000,000, instead of the amount of $5,885,388.22 stated in the Petition.

Correspondingly, the amounts involved in any similar claims will be vastly reduced. To the extent that

the claimants are individual taxpayers, such as partners or joint venturers, the difference in tax rates between the World War II years and current years is probably even less than for corporations. And, as to corporations which were not subject to the maximum tax rate of 80 percent in the latter years of World War II, the net tax reduction will also be smaller.

Eight cases in the courts and 31 at the administrative level do not create an issue of general importance where the operative provisions of the statute expired ten years ago.[9]

Nor has petitioner shown that the cases it states are pending depend solely for disposition on the issue involved in the instant case.

All the cases alleged to be now pending must have been open when the Solicitor General decided more than two years ago not to apply to this Court for a writ of certiorari in the *Wickes* case. That case, too, involved a not insignificant gross tax refund for 1944 and 1945. It is submitted he must have decided, then, that the *Wickes* decision was correct.

4. THE DECISION BELOW IS CORRECT

Twenty-five judges of lower courts, including the Tax Court, have considered the statutory interpretation of Section 124(f)(1) and the extensive legislative history showing the intent of Congress in enacting it.

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[9] In *Beal* v. *United States*, 182 F. 2d 565 (CA-6), certiorari was denied (340 U.S. 852) where the statute in controversy had expired in 1945, despite a conflict and despite the fact that the petition for certiorari pointed out that from 12,000 to 15,000 persons might claim from 16 to 22 million dollars in similar cases and that a number of cases were then pending.

Twenty agree that the decision below is correct; five disagree. Three of those disagreements were registered in the mandamus proceeding in the *Graphite* case decided by the District Court in 1947. With all due respect to the District Court, its opinion is superficial and glosses over both the statutory language and the intent of Congress. Most significantly, the dissenting opinion of Judge Miller in that case (Appendix, p. 8) has won the approval of four judges of the Court of Claims and 15 judges of the Tax Court. No comprehensive opinion has been written in support of the minority view since the opinion of the District Judge in 1947 (Appendix, p. 1), and no judge has undertaken to answer the compelling dissent of Judge Miller.

A comparison of the District Court's opinion with the dissenting opinion in the *Graphite* case and the majority opinion of Judge Madden in the *Wickes* case will demonstrate that the decision below correctly interprets the statute and effectuates the Congressional intent.

The pertinent part of Section 124(f)(1) provided:

> "(f) Determination of Adjusted Basis of Emergency Facility.—In determining, for the purposes of subsection (a) * * *, the adjusted basis of an emergency facility—
>
> "(1) *There shall be included* only *so much of* the amount otherwise constituting *such adjusted basis as is properly attributable to such construction * * * or acquisition after December 31, 1939,* as either the Secretary of War or * * * the Navy has certified as necessary in the interest of national defense * * *." (Italics supplied.)

At the outset it is important to observe that the section is a direction to the Internal Revenue Commissioner as to the cost of the facility which he shall include in determining the taxpayer's amortization deduction under Section 124(a). It is not a Congressional directive to the Secretaries that they shall include in the Certificate only so much of the cost as they deem necessary in the interest of national defense.

In essence, as applied to this case, subsection(f)(1) provides for inclusion in amortizable basis the full cost attributable to the construction of facilities *after December 31, 1939*, if such construction has been certified as necessary in the interest of national defense.

The first question framed by the statute is whether the construction has been certified as necessary in the interest of national defense. That fact is of course established here.

The sole remaining question framed by subsection (f)(1) is what part of the cost ("adjusted basis") "is properly attributable" to construction or "acquisition after December 31, 1939." The statute includes for amortization purposes only the cost of construction or acquisition after December 31, 1939. Congress plainly desired to draw a line dividing the cost of those emergency facilities which were under construction on December 31, 1939, in order to prevent the amortization of the pre-1940 part of the cost of construction.[10] An examination of subsection (e) defining an "emergency facility" will show that the term means any certified facility the construction or acquisition of which was *completed* after December 31, 1939. Thus,

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[10] H.R. Rept. No. 2894, 76th Cong., 3d Sess. (1940) p. 38, quoted *infra* at pages 17-18.

Congress contemplated that necessity certificates would be issued by the certifying agency with respect to construction or acquisition commenced on or before December 31, 1939. But by the terms of subsection (f) (1) Congress directed the inclusion in the adjusted basis (i.e., cost) entitled to amortization only the cost attributable to the part of the construction or acquisition occurring after December 31, 1939 and did not in any way restrict that amortization right to some portion of such cost.

The District Court in the *Graphite* case, however, seized upon the phrase "only so much of the amount otherwise constituting such adjusted basis" as authorizing the War Production Board to certify a percentage of cost for tax amortization as well as the construction or acquisition of facilities.

In order to reach the conclusion that the certifying agency was granted control over the amount of amortizable cost it would be necessary to interpret the statute *as if it read* somewhat as follows:

> In determining the adjusted basis of an emergency facility, there shall be included only so much of the cost [adjusted basis] otherwise amortizable as either the Secretary of War or the Secreary of the Navy has certified as necessary in the interest of national defense during the emergency period.

Such interpretation ignores the all-important phrase following immediately after the statutory words "only so much of the * * * adjusted basis." The ignored phrase is:

> "as is properly attributable to such construction ... or acquisition after December 31, 1939, ..."

At best, the word "such" immediately preceding "construction ... or acquisition" must be deleted to reach the interpretation for which the Government contends. This is exactly what the District Judge did in the *Graphite* case. (Appendix, p. 1, at 5-6.) Judge Miller, in his illuminating dissent, refers to this omission in demonstrating the District Court's misconstruction of the statute. (Appendix, pp. 15-16.) When the word "such" is given its proper meaning it becomes plain that the power of the Secretaries was limited to certification of *such* "construction ... or acquisition," and did not extend to certification of amortizable cost.

If there were any doubt about the correct interpretation of the words of Section 124(f)(1) it is quickly dispelled by a review of the legislative history. It is conclusive of the fact that the Congress intended the full post-1939 cost of certified facilities to be included in the base for tax amortization.

The report of the Ways and Means Committee stated:[11]

> "Section 124 provides that a corporation shall be allowed a deduction for income and excess-profits tax purposes for the amortization of certain facilities which ... either the Secretary of War or the Secretary of the Navy certify as necessary in the interest of national defense during the present emergency. Such facilities are land, buildings, machinery and equipment or parts thereof acquired after July 10, 1940 [changed to December 31, 1939], or the construction, reconstruction, erection, or installation of which was completed after July 10, 1940 [changed to December 31, 1939]. ... Although a facility may be an emergency facility even though its construction was

[11] H.R. Rept. No. 2894, 76th Cong., 3d Sess. (1940) p. 38.

begun on or before July 10, 1940 [changed to December 31, 1939], only so much of its adjusted basis as is attributable to certified construction taking place after July 10, 1940 [changed to December 31, 1939], is subject to amortization. The remainder of the adjusted basis is subject to depreciation. . . ."

Assistant Secretary of the Treasury Sullivan testified before the Senate Finance Committee as follows:[12]

"Senator George: Just a minute, Mr. Sullivan. You say it is necessary for them to certify that it is necessary to national defense. Do they stop there?

"Mr. Sullivan: I beg your pardon.

"Senator George: Is the certificate that is issued on the recommendation of the National Council and the Secretary of War or Navy, as the case may be, limited to mere certification that the particular facility is necessary for defense, or do they go further and specify what the depreciation and obsolescence amounts to?

"Mr. Sullivan: No; they do not.

"Senator George: They turn that back to the Treasury?

"Mr. Sullivan: No sir; under the bill automatically the amortization to which they are entitled is 20 percent, a year, for 5 years."

When the statute was before the House of Representatives for enactment, Representative Boehne of Indiana, a member of the Ways and Means Commit-

[12] Hearings before Senate Finance Committee on Second Revenue Act of 1940, 76th Cong., 3d Sess. (1940) p. 158.

tee and its subcommittee on Internal Revenue Taxation, made the following statement on the floor:[13]

> "Now just what do these amortization provisions do? First, they fix the useful life of facilities certified to be necessary in the national defense as 5 years. They remove all problems of proof.
>
> "Second, there is no bounty, bonus, or windfall involved. Introducing certainty into the present provision is a desirable improvement. It is designed to give the manufacturer, who is asked to furnish needed new facilities, only a fair break.
>
> "Finally, the effect of the clearing-up process is to give a straight-line basis—20 percent a year —* * *.
>
> * * * * *
>
> "In the present national emergency, business is asking no favor of the Government when it merely desires the certainty that private capital expended to construct, or used to acquire, a needed new facility, certified to be necessary for the national defense, may under this law be amortized over a 5-year useful life, which is what business is being told is the present program. If the emergency lasts longer * * * no further deductions * * * will be allowed. The proposed amortization provisions will do no more than is fair and just. It will certainly aid national defense."

The legislative history destroys completely petitioner's contention that the 35 percent limitation is justified by the presumption that the facility would have post-war use. It leaves no doubt that Congress intended

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[13] Congressional Record, Aug. 29, 1940, p. 11240. See also the statement of Representative Jere Cooper, Chairman of the Subcommittee on Internal Revenue Taxation at the time Section 124 was enacted, Id., p. 11246.

to disregard the possible post-war value and utility of the certified facilities in allowing the amortization deduction. William S. Knudsen, a member of the Advisory Commission to the Council of National Defense, testified before the Senate Finance Committee that the Commission unanimously recommended against any provision restricting the post-war use of amortized facilities, and stated:[14]

> "If, at the end of the emergency, it turns out that plant facilities are useful for productive purposes during the emergency period only, the taxpayer is being only fairly dealt with by allowing him to charge off his plant against taxable income during the emergency period. If, however, the plant has productive use after the emergency period is terminated, there is no over-all advantage to the taxpayer in the rapid amortization because during the period after the emergency it will no longer be able to deduct depreciation or amortization on the plant, it having already been completely written off for tax purposes."

In the same Hearings, Senator Vandenberg questioned Secretary Sullivan on this point. In reply, Mr. Sullivan stated:[15]

> "We don't know that that [i.e., a five-year period or less] is the expected useful life. There are certain facilities that are being constructed for purely national-defense projects, which may be just as useful after the war is over, or the present emergency is over, or the particular contract they are built to perform is over, as they

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[14] Hearings before Senate Committee on Finance on Second Revenue Act of 1940, 76th Cong., 3d Sess., p. 159.

[15] Hearings before Senate Finance Committee on Second Revenue Act of 1940, 76th Cong., 3d Sess., p. 124.

> are during the time that contract is being performed."

Secretary Sullivan added:[16]

> "... I couldn't say to this committee that it is reasonable to expect that an ultra-modern factory that is to be constructed in the latter part of 1940 or the first part of 1941, built with all of the latest skill and engineering experience, is going to be absolutely useless in 1946. I don't think that is 'reasonable,' and yet I believe it is desirable and prudent to grant this amortization to those companies that are putting up new facilities for this picture."

Thereafter, Congress enacted practically unchanged, as Section 124 of the Internal Revenue Code, the provisions discussed before the Senate Finance Committee.

The attempt of the petitioner at pages 11-12 of its Petition to push aside the enlightening legislative history must completely fail. The legislative history does "aid in answering the question here at issue" because it specifically shows Congress withheld from the Board the power to certify a percentage of cost which is the question at issue. In view of the many representations which Congress and the Administration had made to encourage the Ohio Power Company and other taxpayers to invest their private capital in defense facilities, and having been granted four certificates under section 124 permitting the amortization of the full cost of similar defense facilities over the emergency period, the 35 percent limitation placed on the fifth certificate creates, as Judge Miller said, a

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[16] Id., p. 125.

result in this case "so incongruous as to be almost grotesque." (Appendix, p. 18.)

The petitioner is equally in error at page 11 when it suggests that the question before the Board was not, "Is the facility necessary," but "How necessary." As heretofore demonstrated, Congress intended to leave only the first question to the certifying agent.

Nor do the Treasury Regulations recognize and provide for Necessity Certificates with percentage of cost limitations as claimed by petitioner (Petition for Certiorari, p. 10).

Sec. 29.124-6[17] deals with three situations:

(1) Where the entire construction was certified and all of it took place after December 31, 1939. (2d ¶)

(2) Where the entire construction was certified but only a portion of such construction took place after December 31, 1939. (3d ¶)

(3) Where only a portion of the construction taking place after December 31, 1939, was certified as necessary. (4th ¶)

In each instance the regulation provides for amortization under Section 124 of the whole post-1939 cost of the *construction certified*. Petitioner therefore is not correct in its statement at page 10 of the Petition that the regulation "specifically envisions partial certifications of the type here issued." The "50 percent

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[17] Reg. 111, Sec. 29.124-6, reproduced at pp. 16-18 of Appendix A to Petition.

Of course, the very fact that the Treasury Regulations deal with the amount of amortizable cost allowable under Certificates demonstrates that the War Production Board had no power to certify amortizable cost but only to certify physical facilities.

certificate" referred to is one where only 50 percent of the *construction* was certified as necessary to national defense. It does not, as petitioner would like this Court to believe, deal with the case at bar, where the entire construction was certified as necessary but its amortizable cost purportedly was limited to 35 percent because the facility was presumed to have post-war utility.

Petitioner also argues that, even if the lower court's interpretation of the statute was correct, it was improper for the court below to allow amortization deductions based on full cost of the taxpayer's certified facility (Petition, pp. 12-13). The contention stems from a misapprehension of the nature of this proceeding. This is not a suit for judicial review of some discretionary action of an administrative body such as is the case of *F.P.C.* v. *Idaho Power Co.*, 344 U.S. 17, cited by petitioner. The suit is for a refund of taxes due upon the basis of giving effect to a certification of the fact that this taxpayer's "Tidd Project Emergency Facility" was necessary in the interest of national defense during the emergency period. The court below merely held that the Certificate met the requirements of Section 124 and applied the mandate of subsection (a) that the "adjusted basis" (i.e. cost) of the certified facility was entitled to be amortized over a sixty months period, or during the emergency period if shorter.

CONCLUSION

There are no valid reasons for granting the petition for a writ of certiorari. The decision below correctly construes Code Section 124 to give effect to the clear intent of Congress. There is no conflict of decisions. The Tax Court of the United States, which is the only other court to decide the precise issue, has joined the Court of Claims in holding against the Government. The problem is not of the scope which merits a review by this Court because the statute involved expired ten years ago and only a few claims remain to be disposed of under that statute. The petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

UNITED STATES GRAPHITE COMPANY,

v.

HARRIMAN, SECRETARY OF COMMERCE.

No. 36695

Filed June 17, 1947

Opinion

J. Marvin Haynes, of Washington, D. C., for plaintiff.

John F. Sonnett, Asst. Atty. Gen., and *Edward H. Hickey,* Sp. Asst. to Atty. Gen., for defendant.

PINE, *Justice:*

Plaintiff is a manufacturer of a graphite product known as "graphitar." It is used particularly in the manufacture of marine and aircraft engines. In 1943 the demand for graphitar began to exceed the capacity of plaintiff's plant. Accordingly, plans were made for a factory addition. and for the necessary machinery and equipment therein required. On June 27, 1943, plaintiff filed an application for a certificate of necessity under Section 124 of the Internal Revenue Code, in order that it might secure a deduction for amortization of the entire cost of the factory addition upon its Federal income and excess profit tax returns, and

on October 28, 1943, a necessity certificate was issued therefor.

On May 29, 1944, plaintiff filed an application for a necessity certificate covering facilities (machinery, etc.) for use in the factory, which had then been constructed. Thereafter plaintiff received a communication dated July 17, 1944, and entitled "letter of predetermination," stating that these facilities were eligible for tax amortization on a 35% basis, provided the date of acquisition was subsequent to the date of such letter. On July 27, 1944, plaintiff filed an affidavit showing that a portion of such facilities had been acquired prior to the date of the letter of predetermination and that the balance had been acquired thereafter; whereupon there was issued to the plaintiff a necessity certificate for that part of the facilities listed as being received after the date of the letter of predetermination, up to 35% of their cost. Thereafter plaintiff demanded the issuance of a certificate which would include the entire cost of all the facilities, irrespective of the date of acquisition. This being refused, plaintiff brought this action to compel its issuance.

Defendant first moved to dismiss the complaint, and subsequently moved for a summary judgment. The action is before me for decision on these motions.

The issuance of this certificate of necessity is authorized by Section 124 of the Internal Revenue Code, 26 U. S. C. 124. Designed to stimulate the investment of private capital in defense facilities, this statute authorized the amortization of their cost as a tax deduction over a period of five years or less.

Plaintiff contends that defendant's predecessor, the War Production Board,[1] had no legal right to issue a necessity certificate for only 35% of the cost of the facilities acquired after the date of the letter of predetermination, but, once having determined to issue a necessity certificate, was required to issue one for the entire cost of the facilities acquired, both before and after such date.

The applicable provisions of this statute are contained in Section 124(f) of the Internal Revenue Code, reading, so far as material, as follows:

> "(f) . . . In determining . . . the adjusted basis of an emergency facility—
>
> > "(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such . . . acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President.
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> • • • • • • • • •
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> > "(3) The certificate provided for in paragraph (1) shall have no effect unless an application therefor is filed before the expiration of six months after the

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[1] Defendant's immediate predecessor was the Temporary Controls Administrator, whose predecessors were, in the order named, Civilian Production Administrator and the War Production Board, the Chairman of which was vested with the functions of the Secretary of War and the Secretary of the Navy under Section 124 of the Internal Revenue Code.

Executive Order No. 9841, April 23, 1947.
Executive Order No. 9809, December 12, 1946.
Executive Order No. 9638, October 4, 1945.
Executive Order No. 9406, December 17, 1943.

beginning of such construction, reconstruction, erection, or installation, or the date of such acquisition . . ."

The applicable provisions of the Regulations[2] prescribed under the above-quoted statute are as follows:

"(3)(c)(vi) *Government and privately financed facilities.* Necessity Certificates will be issued only where it is to the advantage of the government that the facilities in question be privately financed.

"(4) *Application must be filed before construction is begun or date of acquisition.* The construction, reconstruction, erection, installation or acquisition of a facility will not be deemed necessary within the terms of these regulations unless a determination of necessity is made by the certifying authority prior to the beginning of the construction, reconstruction, erection, installation or date of acquisition."

It will be noted that Section 4 of the Regulations, above quoted, provides that the acquisition of a facility will not be deemed necessary unless a determination of necessity is made prior to the date of acquisition. Defendant's action in limiting the certificate of necessity to the facilities acquired after the letter of predetermination appears to be authorized by this regulation, and plaintiff does not contend to the contrary. Instead, it places its reliance upon the claim that the regulation contravenes the statute. The question, therefore, is whether the six-month period may be shortened by regulation, the effect of which was to apply a brake on over-expansion of plant facilities, by requiring their necessity to be determined prior to

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[2] Regulations governing the issuance of necessity certificates under Section 124(f) of the Internal Revenue Code prescribed by the Chairman of the War Production Board with the approval of the President, dated December 17, 1943. 8 F.R. 16964.

acquisition in order to be eligible for tax amortization. As above set forth, the statute provides that the necessity certificate shall have no effect unless application therefor is filed before the expiration of six months after date of acquisition. But the statute also contemplates its implementation by regulation, and expressly provides that certification of necessity shall be under regulations prescribed from time to time by the executive officials. Under defendant's interpretation, the statute permits these officials, in the exercise of discretion, to shorten, by regulation, the time for filing applications for necessity certificates, but places an outside limit of six months on their effectiveness, beyond which executive discretion ceases. This construction would seem to be warranted, in view of the clear purpose of Congress to provide flexibility in administration to meet changing conditions and circumstances in the prosecution of the defense program; but in any event, defendant's construction being reasonable, it cannot be set aside by the courts in this proceeding.[3]

In respect of the second contention of plaintiff, that the statute does not authorize defendant to limit the amortization deduction to 35% of the cost, it should

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[3] Adams v. Nagle, 303 U.S. 532, 542.
Wilbur v. United States ex rel Kadrie, 281 U.S. 206, 219.
Work v. United States ex rel Rives, 267 U.S. 175, 182, 183.
United States ex rel Riverside Oil Co. v. Hitchcock, 190 U.S. 316, 323.
Thomas v. Vinson, 80 U.S. App. D.C. 346, 349.
Red Canyon Sheep Co. v. Ickes, 69 App. D.C. 27, 41.
United States ex rel Corbin v. Doyle, 68 App. D.C. 100, 104.
United States ex rel White v. Coe, 68 App. D.C. 218, 220.
Ickes v. Pattison, 65 App. D.C. 116, 119.
Reichelderfer v. Johnson, 63 App. D.C. 334.
Stookey v. Wilbur, 61 App. D.C. 117, 118.

be pointed out that the statute requires that there shall be included ONLY SO MUCH of the amount as is properly attributable to acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy [later Chairman, War Production Board] has certified as necessary in the interest of national defense, which certification shall be under such regulations as may be prescribed from time to time by the executive officials with the approval of the President. Among the regulations prescribed is Section (3) (c) (vi), *supra,* which provides that necessity certificates will be issued only where it is to the advantage of the government that the facilities be privately financed. Certification under this statute, as implemented by this regulation, clearly involved an exercise of discretion, which will not be set aside unless unreasonable, arbitrary, or capricious.[4] Here the certification was made pursuant to an established policy of the War Production Board which, after December 17, 1943, was vested with the functions of the Secretary of War and the Secretary of the Navy (Executive Order 9406). This policy limited amortization to excess war cost (estimated at 35%) in the case of facilities having presumptive postwar utility, which was found by the Board to be true of the facilities here involved. This would appear to be in furtherance of the legislative purpose to encourage capital investment

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[4] Wilbur v. United States ex rel Kadrie, supra.
Work v. United States ex rel Rives, supra.
United States ex rel Riverside Oil Co. v. Hitchcock, supra.
Calf Leather Tanners Assn. v. Morgenthau, 65 App. D.C. 93, 98, 99.
United States ex rel Bowling v. Hines, 60 App. D.C. 180, 181.
McCarl v. Rogers, 60 App. D.C. 111.
McCarl v. Walters, 59 App. D.C. 237, 238.

in the defense effort which would not be available because of fear that such investment would have no post-war value, and at the same time maintain the amortization benefits under such control that they would not unduly injure the revenue. Thus there is no showing that the exercise of this discretion comes within the exception permitting courts to intervene. So far as its exercise involves interpretation of the statute in question, the statement made in the preceding paragraph is equally applicable to the point here under discussion.

Accordingly the motion for summary judgment will be granted. Counsel will present, on notice, judgment carrying this opinion into effect.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 9680

THE UNITED STATES GRAPHITE COMPANY, APPELLANT

v.

CHARLES SAWYER, SECRETARY OF COMMERCE, APPELLEE

Appeal from the District Court of the United States for the District of Columbia (now United States District Court for the District of Columbia)

Argued October 7, 1948 Decided February 28, 1949

Mr. J. Marvin Haynes, with whom *Messrs. W. C. Magathan* and *F. Eberhart Haynes* were on the brief, for appellant.

Mr. Edward H. Hickey, Special Assistant to the Attorney General, with whom *Messrs. George Morris Fay,* United States Attorney and *Richard E. Guggenheim,* Attorney, Department of Justice, were on the brief, for appellee. *Mr. Herbert A. Bergson,* Acting Assistant Attorney General, also entered an appearance for appellee.

Before EDGERTON, CLARK, and WILBUR K. MILLER, JJ.

PER CURIAM: The judgment is affirmed on the opinion of Judge Pine in the District Court. *United States Graphite Co.* v. *Harriman,* 71 Fed. Supp. 944.

WILBUR K. MILLER, J., dissenting: As my brethren have approved and adopted the District

Court's opinion without reproducing it, I shall restate the case before giving the reasons for my dissent.

In an effort to induce private enterprise to use its own funds in expanding manufacturing facilities to meet the requirements of national defense, the Congress enacted in 1940 § 124 of the Internal Revenue Code. Subsection (a) thereof is in part as follows:

> "Every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis (for determining gain) of any emergency facility (as defined in subsection (e)), based on a period of sixty months. . . ."

This is unequivocal and imperative language and is a grant of a right to the deduction described. If a later provision of § 124 is to be held to have modified a taxpayer's absolute right to the five-year amortization described in subsection (a) by giving to an administrative agency authority to restrict the amortization to something less than the entire cost, I take it that the intention of Congress to do so should be expressed in clear and unmistakable terms.

An emergency facility was defined by subsection (e) as one (a) which had been constructed or acquired after December 31, 1939, and (b) which had been certified by the proper authority as necessary in the interest of national defense.[1]

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[1] The pertinent portion of subsection (e) is as follows:

> "(1) *Emergency facility.* As used in this section, the term 'emergency facility' means any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made. For

The appellant is a manufacturer of a graphite product known as "graphitar." In 1943 when the government required for war purposes greater quantities of graphitar than appellant could produce, the War Department insisted that it double its capacity by erecting a new building and installing therein the necessary machinery and equipment.

Relying—naively, as it turned out—on the provisions of § 124 of the Internal Revenue Code, the appellant erected the building and began the acquisition of machinery and equipment. With respect to the building, the appellant applied on June 27, 1943, for a necessity certificate under subsection (f)(1) of § 124, and received it from the Secretary of War on October 28, 1943. The entire cost of the building could therefore be amortized for tax purposes in the statutory five-year period. But with the acquisition of machinery, the appellant's troubles began. On May 29, 1944, and within six months after the installation of certain

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the purposes of this section, the part of any facility which was constructed, reconstructed, erected, or installed by any person after December 31, 1939, and not earlier than six months prior to the filing of an application for a certificate under subsection (f), and with respect to which part a certificate under subsection (f) has been made, shall be deemed to be an emergency facility, notwithstanding that the other part of such facility was constructed, reconstructed, erected, or installed earlier than six months prior to the filing of such application. For the purposes of this section, the part of any facility which was constructed, reconstructed, erected, or installed by a corporation after December 31, 1939, and before June 11, 1940, and with respect to which part a certificate under subsection (f) has been made, shall be deemed to be an emergency facility and to have been completed on June 10, 1940, notwithstanding that the entire facility was not completed until after June 10, 1940."

machinery and equipment, appellant applied for a covering necessity certificate to the War Production Board, which by Executive Order had succeeded the Secretaries of War and the Navy as the certifying agency. Although both building and machinery were essential to the increased production which the War Department wanted, the War Production Board refused to certify the full cost of the machinery. The Board issued to appellant on July 17, 1944, what it called a "letter of predetermination", stating the machinery and equipment would be eligible for amortization, but attaching two conditions which the appellant asserts were unauthorized.

Those conditions were: (1) that the machinery and equipment acquired by the appellant prior to July 17, 1944, the date of "predetermination", could not be amortized, and (2) that only 35 per cent of the cost of machinery and equipment acquired after that date could be amortized.

The first condition was imposed by the Board pursuant to its own regulation that a necessity certificate would not be issued unless application therefor had been made before the construction or acquisition of the facility.

The second condition was imposed by the Board because it had concluded that only 35 per cent of the cost of appellant's machinery installed after the date of "predetermination" could be certified as necessary to national defense, its idea being that "the facilities sought to be certified were of such a nature as to be presumably useful in post-war operations." Apparently the Board's theory was that 35 per cent of the cost of the machinery represented war-caused excess over the pre-war cost.

With respect to the first condition imposed by the Board pursuant to its regulation that application for certification must be made before the facility had been constructed or acquired,[2] the question is as to the validity of the regulation. To be sure, the Board had express authority under subsection (f)(1) to prescribe regulations governing certification. But a regulation may not conflict with the statute under which it is promulgated.

This regulation is in direct conflict with subsection (f)(3) of the statute, the pertinent portion of which follows:

> "(3) The certificate provided for in paragraph (1) shall have no effect unless an application therefor is filed before the expiration of six months after the beginning of such construction, reconstruction, erection, or installation or the date of such acquisition, or before December 1, 1941, whichever is later, ..."

Because of the conflict with the statute, the regulation was invalid and did not confer upon the War Production Board power to exclude from the necessity certificate all the cost of the machinery and equipment which the appellant acquired prior to July 17, 1944. Application for certification of that cost was season-

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[2] The regulation, dated December 17, 1943, 8 Fed. Reg. 16964, was approved by the President and the pertinent portion is as follows:

> "(4) *Application must be filed before construction is begun or date of acquisition.* The construction, reconstruction, erection, installation or acqisition of a facility will not be deemed necessary within the terms of these regulations unless a determination of necessity is made by the certifying authority prior to the beginning of the construction, reconstruction, erection, installation or date of acquisition."

ably made under the terms of the statute and could not be refused on the ground that the application had not been made before acquisition as required by the invalid regulation.

The second condition imposed by the Board in its "letter of predetermination" which restricted the taxpayer to a deduction with respect to the amortization of only 35 per cent of the cost of its machinery and equipment acquired after July 17, 1944, was authorized, the appellee contends, by § 124 (f)(1), which is as follows:

> "... In determining, for the purposes of subsection (a) or subsection (h), the adjusted basis of an emergency facility—
>
> "(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President."

In order to reach the extraordinary conclusion that subsection (f) (1) authorizes the certification as necessary to national defense of less than 100 per cent of the cost of a facility otherwise "emergency" in character, the appellee is forced to read subsection (f)(1) as though it provided:

> There shall be included in amortizable cost only so much of the cost of the facility as ... the Secretary ... has certified as necessary in the interest of national defense ....

Such reading omits important words in the subsection. It overlooks completely the fact that its language includes the following:

> "... as is properly attributable to such construction ... after December 31, 1939, as ... the Secretary ... has certified as necessary in the interest of national defense. ..."

The appellee's construction of subsection (f)(1) as meaning "only so much of the cost as has been certified as necessary in the interest of national defense" does plain violence to the grammatical structure of the statutory sentence, for, as has been said, it leaves out important words. Careful reading of the poorly worded subsection reveals its meaning as

> There shall be included as amortizable cost only so much of the cost of the facility as is properly attributable to the part of it which was constructed after December 31, 1939, and which has been certified as necessary in the interest of national defense.

We have seen that subsection (e), in defining the term "emergency facility", expressly excluded anything constructed or acquired before December 31, 1939. That critical date of subsection (e) was carried on into subsection (f)(1), which undertook to govern a situation involving a facility, a part of which was constructed before December 31, 1939, and so could not be amortized, and the other part of which was constructed after that date and so could be certified for amortization. I admit the Congress did a poor job of statute writing in framing subsection (f)(1); but when all the subsections are read together the meaning can be spelled out. The mere fact that subsection (f)(1) is so written does not justify a construction of it which eliminates important words and thereby dis-

torts it. I think subsection (f)(1) clearly means there can be amortized only the "adjusted basis" (which in this case means cost) of that physical portion of a facility which is "emergency" in character in that (a) it had been constructed after December 31, 1939, and (b) it had been properly certified as necessary in the interest of national defense.

The District Court's opinion, which has been adopted by my brethren as the opinion of this court, includes the following:

> "In respect of the second contention of plaintiff, that the statute does not authorize defendant to limit the amortization deduction to 35% of the cost, it should be pointed out that the statute requires that there shall be included ONLY SO MUCH of the amount as is properly attributable to acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy [later Chairman, War Production Board] has certified as necessary in the interest of national defense, which certification shall be under such regulations as may be prescribed from time to time by the executive officials with the approval of the President."

I suggest, with deference, that the foregoing is a distortion of the grammatical construction of the statutory sentence. It leaves out significant words in the statute, as I have pointed out heretofore. For the statute says "only so much of the amount ... as is properly attributable to such construction ... as ... the Secretary ... has certified as necessary in the interest of national defense." Obviously the meaning is "such construction as the Secretary has certified as necessary"; therefore, that there shall be included only so much of the cost as is properly attributable to such construction, after the critical date, as has been certified as necessary. If that were not true, the word

"such" before the word "construction" would be without significance.

The opinion of the District Court continues thus:

> "... Here the certification was made pursuant to an established policy of the War Production Board which, after December 17, 1943, was vested with the functions of the Secretary of War and the Secretary of the Navy (Executive Order 9406). This policy limited amortization to excess war cost [estimated at 35%] in the case of facilities having presumptive postwar utility, which was found by the Board to be true of the facilities here involved. This would appear to be in furtherance of the legislative purpose to encourage capital investment in the defense effort which would not be available because of fear that such investment would have no postwar value, and at the same time maintain the amortization benefits under such control that they would not unduly injure the revenue."

This amounts to saying that Congress intended to write into § 124 the idea of value for post-war use which was the basis of amortization under a somewhat similar statute enacted in 1918.

Under the 1918 act, if a facility had post-war useful value the difference between that estimated value and actual cost was allowed as a special amortization deduction. The legislative history of the act now under consideration convincingly demonstrates that Congress deliberately and purposefully departed from the principle of the 1918 act because experience had demonstrated it to be unsatisfactory and not productive of the desired result.

I shall not prolong this dissent by going fully into the legislative history of § 124. One brief quotation from the testimony of the Assistant Secretary of the

Treasury before the Senate Finance Committee will suffice to indicate the understanding which Congress had of the section as shown by the entire voluminous legislative history.

> "Senator George: Is the certificate that is issued on the recommendation of the National Council and the Secretary of War or Navy, as the case may be, limited to mere certification that the particular facility is necessary for defense, or do they go further and specify what the depreciation and obsolescence amount to?
>
> "Mr. Sullivan: No, they do not.
>
> "Senator George: They turn that back to the Treasury?
>
> "Mr. Sullivan: No, sir; under the bill automatically the amortization to which they are entitled is 20 per cent a year, for 5 years."

At the time this discussion took place, subsection (f)(1) had been passed by the House and after this testimony the only change was to eliminate any participation by the Council of National Defense, leaving the certifying power to the Secretaries of War and the Navy.

We should remember that the five-year amortization provision is in reality nothing more than an acceleration of the ordinary allowable depreciation which in the course of time would retire the property.

A proposal that the government shall own all property which has been fully depreciated at the ordinary allowable rate would be generally rejected as unsound. It is therefore illusory to suggest, as was done in argument, that the government should take over all facilities fully amortized in five years under § 124. A suggested inclusion in the act of a provision that the

government might acquire the facility at the end of amortization for the nominal cosideration of $1.00 was rejected during congressional consideration.

After exhaustive study, I have been able to discover nothing in the language of the act, or in its legislative history, to indicate the Congress intended to give the certifying agency the right to determine that only a portion of the cost of a necessary facility could be amortized. The result in this case is so incongruous as to be almost grotesque. Here the War Department, badly in need of large quantities of graphitar, insisted that the appellant erect a new building and equip it with the necessary machinery, which the appellant proceeded to do. The Secretary of War certified the building to have been necessary in the interest of national defense. It does not comport with common sense for the War Production Board in 1944 to certify that only 35 per cent of a fraction of the cost of the machinery was necessary in the interest of national defense. The building alone could not produce graphitar and yet the building was certified as necessary in its entirety. It is not suggested that the need for graphitar was any less pressing in 1944 than in 1943.

For the reasons given I think the decision of the court is wrong. The judgment of the District Court should be reversed.

IN THE TAX COURT OF THE UNITED STATES

Docket No. 37694

(Filed March 14, 1955)

NATIONAL LEAD COMPANY, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Floyd F. Toomey, Esq., and *Karl Reimer, Esq.*, for the petitioner.

Clay C. Holmes, Esq., and *James E. Markham, Jr., Esq.*, for the respondent.

Opinion

MURDOCK, *Judge:*

* * * * * * * *

War Facility Amortization.

The petitioner acquired, dissolved, and, after June 30, 1944, carried on the business of the American Bearing Corporation. American Bearing had filed applications for certificates of necessity to cover the cost of constructing facilities for the purpose of producing war products. Certificates of necessity respecting those facilities were issued pursuant to section 124 of the Internal Revenue Code, stating that the facilities "are necessary in the interest of national defense during the emergency period, up to 50% [in some 35%] of the cost." The facilities were constructed. The purpose of the certificates was to permit the petitioner to amortize the cost of the additional facilities over a period of 60 months rather than recover their cost through depreciation deductions over the normal useful lives of the facilities. The petitioner claimed accelerated

depreciation for the entire cost of the facilities, but the Commissioner limited the accelerated amortization to the percentages fixed in the certificates of necessity. The petitioner contends that the percentage limitations which the certifying authorities purported to impose must be ignored because they are in violation of the words of and the intention of Congress behind section 124.

Section 124 (a) provides that every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis of any emergency facility based upon a period of 60 months. Subsection (e) defines emergency facility as "any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31 1939, and with respect to which a certificate under subsection (f) has been made." Section 124 (f) (1) provides that in determining the adjusted basis of an emergency facility "there shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period" under regulations prescribed by the certifying authority with the approval of the President. The certificates in question were for construction after December 31 1939, and it is conceded that the adjusted basis of that construction is cost.

The petitioner contends that the words "only so much of the" cost refer to construction after Decem-

ber 31, 1939, and that the provision may not be read "the cost attributable to so much of such construction as the certifying authority has certified as necessary in the interest of national defense during the emergency period." It says the certifying authority was to certify facilities, not costs.

The United States Graphite Company sought to compel the certifying authorities to issue certificates which would cover all rather than only part of the cost of facilities which it had constructed. The District Court for the District of Columbia dismissed the complaint. *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944. The Court of Appeals for the District of Columbia affirmed per curiam without opinion, but Judge Wilbur K. Miller filed a dissent in which he discussed the problem. *United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868, certiorari denied 339 U.S. 904. That taxpayer then sued on a claim for refund of taxes in the Court of Claims on the ground that the percentage of cost limitation on its certificates should be ignored. The Court of Claims held for the taxpayer, and the Government did not seek a writ of certiorari. *Wickes Corp.* v. *United States*, 108 F. Supp. 616.[2]

Judge Miller, in his dissenting opinion referred to above, considered and discussed the words used by Congress, the purpose which it sought to accomplish, and the legislative history of section 124. He stated, "After exhaustive study, I have been able to discover nothing in the language of the Act, or in its legisla-

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[2] The Wickes Corporation was the successor to the United States Graphite Company. The cases also involved another issue which is not in the present case.

tive history, to indicate that Congress intended to give the certifying agency the right to determine that only a portion of the cost of a necessary facility could be amortized." His interpretation of section 124 (f) (1) was that it meant "there shall be included as amortizable cost only so much of the cost of the facility as is properly attributable to the part of it which was constructed after December 31, 1939, and which has been certified as necessary in the interest of national defense." The Court of Claims came to the same conclusion. This Court believes that the reasoning of Judge Miller in his dissenting opinion and of the Court of Claims is sound and that a correct interpretation of the provisions of section 124 entitles the petitioner in this case to amortize the full cost of the facilities certified over the accelerated period.

Reviewed by the Court.

Decision will be entered under Rule 50.

OPPER, *J.*, dissents on the last issue on the authority of *United States Graphite Co.* v. *Sawyer,* (C.A., D.C. Cir.) 176 F. 2d 868, certiorari denied 339 U.S. 904; and in consonance with the dissenting opinion of Chief Judge Jones in *Ohio Power Co.* v. *United States,* (Ct. Cl., Mar. 1, 1955) — F. Supp. —.